Supreme Court, U.S.
FILED
JAN 26 2004
OFFICE OF THE CLERK

No. 03-1076

IN THE

Supreme Court of the United States

October Term, 2003

ASTON B. WILLIAMS, M.D.,

Petitioner,

vs.

JOSEPH MADDI, OLIVIA BLACKWELL, THOMAS A. HASSENFRATZ, JOSEPH SERGHANY and SHEEHAN MEMORIAL HOSPITAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FOURTH JUDICIAL DEPARTMENT.

PETITION FOR WRIT OF CERTIORARI

GERALD T. WALSH, ESQ.
Counsel of Record
ZDARSKY, SAWICKI & AGOSTINELLI
404 Cathedral Place
298 Main Street
Buffalo, New York 14202
Telephone: (716) 855-3200

Attorneys for Petitioner
Aston B. Williams, M.D.

BATAVIA LEGAL PRINTING, INC.—Telephone (866) 768-2100

QUESTIONS PRESENTED

1. Whether state courts can lawfully apply heightened pleading and proof requirements to an African American physician's claim alleging racial discrimination in violation of 42 U.S.C. §§1981, 1982, 1983, and 1985?

2. Whether the state courts below violated Dr. Williams' equal protection and due process rights by denying his right to conduct discovery to support his claim while allowing defendants to obtain discovery?

LIST OF PARTIES

In addition to the parties appearing in the caption of the case on the cover page, Michael Mitchell and Stanley Pietrak were named as defendants in petitioner's complaint.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT OF CERTIORARI 12

I. State Courts Exercising Concurrent Jurisdiction Cannot Impose Heightened Pleading and Proof Standards Upon Federal Civil Rights Conspiracy Claims .. 12

II. Civil Rights Plaintiffs Are Entitled to Discovery to Prove Racial Motivation and State Action 19

CONCLUSION 23

INDEX TO APPENDICES

Page

APPENDIX A
Order of the New York Court of Appeals filed October 28, 2003 ..... 1a

APPENDIX B
Memorandum and Order of the New York Supreme Court, Appellate Division, Fourth Department, Filed June 13,2003 ..... 3a

APPENDIX C
Order of the New York Supreme Court (Erie County, Nemoyer, J.), Granted October 9, 2002 and Entered October 15, 2002 ..... 6a

APPENDIX D
Transcript of Bench Decision of the New York Supreme Court (Erie County, Nemoyer, J.), Dated September 6, 2002 .... 10a

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES:

Adickes v. Kress & Company,
398 U.S. 144 (1970) 16,17

Albert v. Carovano,
851 F.2d 561 (2d Cir. 1988) 14,15,16,17,18

Angola v. Civiletti,
666 F.2d 1 (2d Cir. 1981) 13

Capital Imaging Associates, P.C. v.
Mohawk ValleyMedical Associates, Inc.,
725 F.Supp. 669 (N.D.N.Y. 1989) 20

Continental Ore Company v.
Union Carbide and Carbon Corp.,
370 U.S. 690 (1962) 16

Desert Palace, Inc. v. Costa,
____ U.S. ____ 123 S. Ct. 2148,
156 L.Ed.2d 84 (2003) 12,14

Dwares v. City of New York,
985 F.2d 94 (2d Cir. 1993) 16

Hoffman-Laroche, Inc. v. Greenberg,
447 F.2d 872 (7th Cir. 1971) 16

Jackson v. Metropolitan Edison Co.,
419 U.S. 345 (1974) 14,15

Page(s)

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S.163 (1993) 13,14

Long Island Lighting Company v. Cuomo, 666 F.Supp. 370 (N.D.N.Y. 1987), vacated in part on other grounds, 888 F.2d 230 (2d Cir. 1989) 20

Lugar v. Edmondson Oil Company, 457 U.S. 922 (1982) 15

Payne v. Axelrod, 871 F.Supp. 1551(N.D.N.Y. 1995) 13

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 12,14

St. Francis College v. Al-Kazraji, 481 U.S. 604 (1987) 17

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711(1983) 14

White v. Frank, 680 F.Supp. 629 (S.D.N.Y.), appeal dismissed, 855 F.2d 956 (2d Cir. 1988) 20

Williams v. Greendolf, Inc., 835 F.Supp. 137 (S.D.N.Y. 1990) 20

Page(s)

FEDERAL STATUTES:

42 U.S.C. §1981 2,17,18

42 U.S.C. §1982 2,17,18

42 U.S.C. §1983 ..... *passim*

42 U.S.C. §1985 ..... *passim*

STATE CASES:

Kubik v. New York State Department of Social Services, 244 A.D. 2d 606, 610 (3d Dept. 1997) 13

Williams v. Maddi, 306 A.D.2d 761 N.Y.S.2d 890 (4th Dept. 2003) 3

MISCELLANEOUS:

42 ALR Fed. 463 "Action of Private Hospital as State Action under 42 USC §1983 or Fourteenth Amendment" (1979) 14

Petitioner Aston B. Williams respectfully prays that a writ of certiorari issue to review the order of the New York Supreme Court, Appellate Division, Fourth Department, filed June 13, 2003.

OPINIONS BELOW

Annexed hereto at **Appendix C** is a copy of the order entered October 16, 2002, in the New York Supreme Court, Erie County (Nemoyer, J.), which granted the motions of defendants-respondents and dismissed the complaint against them. The trial court's unreported September 6, 2002 decision is annexed at **Appendix D**.

On June 13, 2003, the Appellate Division, Fourth Department, unanimously affirmed Supreme Court's order in a memorandum and order (**Appendix B**), which is reported at 306 N.Y.S.2d 890, 761 N.Y.S.2d 890. Notice of entry was hand delivered to plaintiff's counsel on June 16, 2003.

On October 28, 2003, the New York Court of Appeals denied Dr. Williams' motion for leave to appeal (**Appendix A**), in a decision reported at 100 N.Y.2d 516.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 USC §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §§1981, 1982, 1983 and 1985.

Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Proceedings

Petitioner Aston B. Williams, M.D. ("Dr. Williams") commenced a civil rights action in New York State Supreme Court, Erie County, on June 26, 2001, seeking damages for respondents' conspiracy to violate his due process and equal protection rights, pursuant to 42 U.S.C. §§1981, 1982, 1983 and 1985) (Record "R." 31-42).

Dr. Williams timely appealed from the order of the New York Supreme Court, Erie County (Nemoyer, J.), entered October 16, 2002 (R 10, Appendix A hereto), dismissing his action to redress racial discrimination and granting summary judgment to respondents Joseph Maddi, Olivia Blackwell, Thomas A. Hassenfratz, Joseph Serghany, and defendant Sheehan Memorial Hospital ("Sheehan"). Dr. Williams also appealed from the denial of his motions (i) for an order for a continuance to permit affidavits to be obtained and disclosure to be had prior to consideration of the summary judgment motion; (ii) for an order compelling responses to plaintiff's notice to produce and providing firm dates for depositions of

the respondents; and (iii) for an order lifting the discovery stay imposed by New York CPLR Rule 3214(b) (R. 13). On June 13, 2003, the New York Appellate Division, Third Department affirmed the dismissal of Dr. Williams' claims (Appendix B hereto). See, Williams v. Maddi, 306 A.D.2d 852, 761 N.Y.S.2d 890 (4th Dept. 2003). Dr. Williams timely served a motion for permission to appeal, which was denied by the New York Court of Appeals on October 28, 2003 (Appendix A hereto).

Facts

In 1991, Aston Williams, M.D., an African-American physician with a specialty in gastroenterology, was appointed chief of his specialty at Sheehan, in Buffalo, New York.

In late 1995, defendant Olivia Smith Blackwell became Chief Executive Officer of Sheehan (R. 1101). Dr. Blackwell, who came to Sheehan from the New York State Department of Health, aggressively pursued additional financing from HUD, New York State agencies, and federal officials, including Senator Charles Schumer, and Congressman Jack Quinn. In the mid 1990's Sheehan applied for and obtained federal funds, block grants and state funds, adding to comprehensive regulatory agreements in place since 1976 due to extensive governmental financing (R.1099-1141).

Shortly after Dr. Blackwell's arrival, the New York State Attorney General was called to investigate Sheehan's then medical director, Dr. Kenneth Gayles, an African-American physician, who was ultimately exonerated (R. 62, 1127). Dr. Blackwell then sought to prevent Dr. Gayles from returning to Sheehan's cardiology clinics, notwithstanding the rulings of a Medical Executive Committee (the "Committee" also referred to as the Medical Executive Board) of his peers (chaired by Dr. R. Fazili) that he was entitled to do so (R. 375-360, 660, 673).

Dr. Blackwell's pattern of refusing to abide by Sheehan's bylaws in cases involving minority

physicians continued in 1999 with Dr. Ken Jin, an Asian-American, who was summarily suspended and subjected to extraordinary and unauthorized disciplinary measures by Dr. Blackwell, despite review and clearance by his peers. While Dr. Jin acted swiftly to control his patient's surgical bleeding, the white surgeon who replaced Dr. Jin was not subjected to discipline in the case of a patient who bled to death (R. 61, 62, 656, 657, 889).

In 1999, Dr. Williams and other minority physicians met at a restaurant in Buffalo to discuss the treatment of Dr. Jin, as well as the treatment of Dr. Fazili, the former Medical Executive Committee chairperson who had supported Dr. Gayles and Dr. Jin, and then lost her laboratory contract at the hospital (R. 61, 62, 83, 658, 673). Respondents Joseph Serghany and Thomas Hassenfratz were present at such meetings (R. 658).

On October 28, 1999, while Dr. Williams was performing an endoscopic procedure at Sheehan, he was asked by Sheehan's Chief Nurse Nancy Lampkin to respond to a code. When Dr. Williams arrived in the emergency room, the code had ended. The emergency room physician advised Dr. Williams of the status of the patient and agreed that the patient needed to be resuscitated before any procedure could be considered. Dr. Williams then went to another hospital, where he had other scheduled procedures (R. 87, 88, 651-52).

Later that morning, Michael Mitchell, M.D. called Dr. Williams and asked him to perform an endoscopic procedure on the same patient. Dr. Williams explained to Dr. Mitchell that the patient was in no condition for any endoscopic procedures without resuscitation. Dr. Mitchell became angry, told Dr. Williams that he was not to touch "his patient," and hung up the phone (R. 57-59, 652-53). Dr. Williams later discovered, at Sheehan's Committee meetings, that the patient had coded several more times, and that the attending physician initially called Stanley Pietrak, M.D. as the consultant on the case, but Dr. Pietrak claimed he was too busy to attend to the patient (R. 116-17, 659).

Ultimately, Dr. Pietrak and Dr. Mitchell performed what Dr. Williams believes was a contra-indicated procedure, and the patient passed away that day. The patient's record revealed that he had been bleeding from the nose, rather than the upper GI tract. (R. 652, 656-57, 977-980). Dr. Mitchell, who had been recruited by Sheehan's new medical director, Dr. Joseph Maddi, complained to Blackwell and other physicians at Sheehan that Dr. Williams had abandoned the patient (R. 656, 658-59).

Although Dr. Maddi, then Sheehan's Medical Director, advised Dr. Williams that a November 1999 meeting to review the October 28, 1999 incident was being rescheduled, the following day, Dr. Williams was advised that the Committee, in his absence, suspended his privileges (R. 653-54, 1007). Dr. Williams appeared before the Committee, with counsel, on November 22, 1999, to demand that the suspension be revoked (R. 654,1009).

In a memorandum dated November 19, 1999 (R. 1005), Dr. Thomas Hassenfratz, then President of the Medical Staff, and Dr. Maddi advised members of Sheehan's Committee of a meeting, with respect to the confirmation of the case review, to be held on December 2, 1999. Defendant Serghany was listed as a member of the Committee and defendant Blackwell was listed as an executive. Among the individuals involved in the case, defendants Pietrak and Mitchell were listed. Incredibly, even though Dr. Williams was not even listed as an individual involved in the case, he was summarily suspended.

Shortly after the Committee's December 1999 meeting, Dr. Williams was advised by three Committee members that he had been exonerated (R. 654-55). Dr. Blackwell, displeased with the Committee's exoneration of Dr. Williams, without any authority under Sheehan's bylaws, tried to revive disciplinary proceedings against plaintiff at a Committee meeting in early 2000. Dr. Blackwell then tried to circumvent the Committee and its decision by drafting a February 8, 2000 letter for Dr. Eddie Hoover to sign (from the Board of Trustees' Professional Affairs Committee) and send to Dr. Hassenfratz. Dr. Hoover told Dr. Williams that Dr. Blackwell instigated the letter and that she was out to get Dr. Williams. Dr. Hoover's non-party deposition was scheduled twice and put off, based on defense counsel's representation that they were representing Dr. Hoover (R. 324). Dr. Hoover told Dr. Williams that Sheehan's attorneys never represented him.

On June 8, 2000, defendant Hassenfratz, purportedly on behalf of the Committee, sent a letter to Dr. Williams, re-opening the issue of the plaintiff's conduct in connection with the October 28, 1999 case (R. 902). Sheehan also sent Dr. Hassenfratz's letter to the New York State Department of Health Office of Professional Medical Conduct ("OPMC") (R. 670). Dr. Williams demanded retraction of Hassenfratz's June 8, 2000 letter and removal of the letter from his file (R. 146). No response was received.

In July 2000, the Medical Executive Committee, with defendant Serghany presiding, considered Hassenfratz' June 8, 2000 letter and the plaintiff's response, but Serghany tabled the issue without any decision on the merits (R. 668).

In August 2000, Dr. Williams met Dr. Hassenfratz at the post office and asked him why he wrote the letter and why he had not responded to letters demanding a retraction (R. 79). According to Dr. Williams, Dr. Hassenfratz said he had issued the June 8, 2000 letter despite the Committee's findings and despite the fact that he was no longer either the President of or a member of the Committee because "they made me do it." (R. 655). Because Sheehan refused to retract the Hassenfratz letter, Dr. Williams commenced a mandamus proceeding in New York State Supreme Court(R. 906).

In the state mandamus ("Article 78") proceeding, Dr. Williams obtained a judgment declaring the *ultra vires* June 8, 2000 letter a nullity, and expunging the letter from his file, with notice to the OPMC. In the

instant action, Dr. Williams sought damages for, *inter alia*, the legal costs incurred in his successful Article 78 proceeding to overturn the respondents' violation of his right to due process.

Justice Jerome C. Gorski's decision and order (R 896-899) in Dr. Williams' Article 78 proceeding (R 900) conclusively established, pursuant to the Committee's minutes (R 138-141), that Sheehan's Committee had exonerated Dr. Williams (R. 897). Justice Gorski determined that Sheehan violated its bylaws: (i) by failing to memorialize such exoneration, and (ii) six months later, in June, 2000, by having the former Committee president issue a letter, far outside the time frame (and without procedural basis) in the bylaws, which did not conform in any way with the findings in December, 1999 (R 897-899).

In his complaint filed on June 26, 2001(R 31-42), Dr. Williams alleged that respondents Maddi and Blackwell, together with Hassenfratz and Serghany, and with the participation and assent of Dr. Pietrak and Dr. Mitchell, as part of a scheme to drive African-American and other minority physicians from Sheehan, conspired to cast Dr. Williams as the scapegoat for the October 28, 1999 events described above.

Dr. Williams alleged that Dr. Maddi and Dr. Blackwell conspired to curtail or eliminate the practices of African-American and other minority physicians at Sheehan (Dr. Williams, Dr. Gayles, Dr. Dillon, Dr. Jin, Dr. Fazili, Dr. Kamisetti), and replace them with white physicians.

Dr. Blackwell removed Dr. Alva Dillon, an African-American, who had succeeded Dr. Gayles as Sheehan's medical director, and replaced him with defendant Maddi in May 1999. Dr. Ken Jin, an Asian-American, summarily suspended by Dr. Blackwell in June 1999, was replaced by white physicians Drs. Gage, Heyden, Bempke, Dr. John Haumesser, Dr. Keith Stubbe and defendant Mitchell. Dr. R. Fazili, Pathology Laboratory Director at Sheehan for ten years, was replaced by Dr. William James when her contract was not renewed for November 1999 following her support for Dr. Jin. Dr. Williams was forced to leave, despite his exoneration, and was replaced by Dr. Antonio Mannone and defendant Pietrak. Dr. Dhanahjaya Kamisetti, Chief of Anesthesiology at Sheehan for approximately 10 years, was forced out after his support for Dr. Jin and Dr. Williams, and was replaced by Dr. Cesar (R. 224, 231-233, 889-894).

When Dr. Mitchell told various physicians and hospital personnel (including defendants Blackwell and/or Maddi) that plaintiff had abandoned the patient who died on October 28, 1999, Dr. Blackwell told Hassenfratz that an "incident reportable to the Department of Health had occurred, resulting in a patient's death." (R. 388). According to Hassenfratz, he was further advised by Dr. Blackwell "concerning the failure of Dr. Williams to attend to the patient and to document any concerns or course of action in the patient's chart." Hassenfratz said he was "also advised, in similar substance, of this incident by Dr. Maddi." (R. 388).

In interrogatory responses (R. 178-237), deposition testimony (R. 48-134, 349-386, 407-517, 687-868), and documents concerning the Medical Executive Committee meetings (R. 869-894, 976-1010), including pertinent decisions, pleadings and documents from the Article 78 proceeding (R. 895-975), Dr. Williams detailed the acts of each respondent in furtherance of the conspiracy to deprive him of his property and liberty rights.

Respondents' submitted affidavits containing demonstrably false statements (R 681-683), without offering any reason for pursuing Dr. Williams outside the scope of Sheehan's by-laws, despite exoneration by his peers.

Respondents' knew that Dr. Williams had been exonerated, yet brought the OPMC into the matter. Because Dr. Williams had been deprived of his right to due process under the hospital's bylaws and procedures (R 666-668), Dr. Williams sought redress under the federal statutes proscribing conspiracies (both private in nature and with concerted state action) to deprive persons of their civil rights.

REASONS FOR GRANTING THE WRIT

I. State Courts Exercising Concurrent Jurisdiction Cannot Impose Heightened Pleading and Proof Standards Upon Federal Civil Rights Conspiracy Claims

Federal civil rights legislation, beginning in 1866 to the most recent amendments of 1991, is designed to protect the rights of African American citizens who had been systematically deprived of due process and justice in the southern states. Congress provided concurrent remedies in state and federal courts to redress violations of such rights. Congress' intent is frustrated when states impose supplemental procedural hurdles in federal civil rights cases. As civil rights actions are increasingly being filed in state court, due in part to the backlog of cases in federal courts, this court should aid state courts by setting uniform standards for review of pleadings and proof in federal civil rights claims.

On June 9, 2003, this Court held that circumstantial evidence is sufficient to state a federal discrimination claim under Title VII (regarding employment), rejecting the argument that only direct proof will do, in the absence of a statutorily imposed, heightened evidentiary burden. Desert Palace, Inc. v. Costa, ___ U.S. ___ 123 S. Ct. 2148, 2154, 156 L.Ed.2d 84 (2003) ("circumstantial evidence is not only sufficient, but may be also more certain, satisfying and persuasive than direct evidence"); see also, Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). The Court should review the Appellate Division's

erroneous application of heightened pleading and proof requirements to plaintiff's federal racial discrimination claims, an issue of great significance in civil rights actions filed in state courts.

Dr. Williams' complaint and submissions provided detailed information and evidentiary support. Kubik v. New York State Department of Social Services, 244 A.D. 2d 606, 610 (3d Dept. 1997), cited in the Appellate Division's memorandum decision, relied upon Angola v. Civiletti, 666 F.2d 1, 4 (2d Cir. 1981), no longer persuasive authority for dismissal of a federal civil rights action, for the proposition that "a claim for conspiracy to violate civil rights requires a detailed fact pleading." Ironically, in Angola, the Second Circuit actually found that the plaintiff challenged the government's motive with enough specificity to require the government to respond to the action.

In Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S.163 (1993) the Court held that a federal court may not apply a heightened pleading standard more stringent than usual pleading requirements in civil rights cases alleging municipal liability under §1983. The same rule should apply to state courts exercising concurrent jurisdiction over civil rights conspiracy claims against individuals under §1983 and §1985.

Federal courts in New York and other jurisdictions have questioned whether the Court's decision in Leatherman is at odds with the Second Circuit's decision in Angola. See, e.g., Payne v. Axelrod, 871

F.Supp. 1551, 1556, fn. 7 (N.D.N.Y. 1995). Applying the Court's opinion in Leatherman, together with the Court's recent holdings in Desert Palace and Reeves, dismissal of Dr. Williams' civil rights claims was clearly erroneous. See also, United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 (1983).

Pursuant to Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the controlling federal precedent regarding establishment of a nexus between government actors and alleged civil rights violations, Dr. Williams showed not only that Sheehan received federal and state funds, as most hospitals do, but also that Sheehan was under the coercive control of government officials, by virtue of its complete reliance on HUD financing, and comprehensive controls contained in a HUD regulatory agreement (R 1054-1078). Dr. Williams proffered evidence of a series of state and federal bailouts, which increased the level of control of Sheehan's affairs by government officials (R 1099-1141). See, generally, 42 ALR Fed. 463 "Action of Private Hospital as State Action under 42 USC §1983 or Fourteenth Amendment (1979).

The Appellate Division's decision conflicts with Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988), cited by respondents below, an action by suspended private college students who claimed discrimination, which was dismissed because suspensions were imposed on all students, without regard to race or ethnicity. The students in Albert v. Carovano based their §1983 claim that the college was a state actor on disciplinary rules adopted pursuant to New York Education Law

§6450. Dr. Williams did not claim that the peer review process conducted pursuant to New York statutes, by itself, constitutes state action. Rather, Dr. Williams claimed that the higher level of government involvement and control of Sheehan's affairs rises to the level of state action under Jackson v. Metropolitan Edison Company. Viewing the totality of circumstances, including severe financial controls in place at Sheehan, documented by the HUD mortgage regulatory agreement and news articles regarding federal and state bailouts, Dr. Williams sufficiently established a question of fact from which a jury could reasonably conclude that the state action element of his *prima facie* claim had been met.

In attempting to justify why respondents sent the June 8, 2000 Hassenfratz letter regarding Dr. Williams to the OPMC, respondents took the position that the state required notice to the OPMC based on the fact that a patient had died and that the peer review minutes directed that a letter would be sent to Dr. Williams. Contacting OPMC was respondent Blackwell's idea, as confirmed in board minutes submitted by the respondents in support of their motions (R 141). Notwithstanding debate concerning whether notice to OPMC was required and the holding in the Article 78 proceeding that Sheehan's peer review minutes say nothing about sending a letter to Dr. Williams, according to the holding in Albert v. Carovano, state action was established by respondents' assertion of conduct "under the compulsion of the state." See, Albert v. Carovano, supra, 851 F.2d at 568, citing, Lugar v. Edmondson Oil Company, 457 U.S. 922, 937-39 (1982). Instead of

a judgment made by a private party, according to professional standards that were not established by the state, state action can be shown by respondents' suggestion that they were forced to notify OPMC by compulsion of state law. Under Albert v. Carovano, and the cases cited therein, Dr. Williams' §1983 claim should not have been dismissed. See also, Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993).

Regarding Dr. Williams' private civil conspiracy claim, a plaintiff is not required to provide direct evidence of the agreement between the conspirators; "circumstantial evidence may provide adequate proof of conspiracy." Hoffman-Laroche, Inc. v. Greenberg, 447 F.2d 872, 875 (7th Cir. 1971). Testimony from the conspirators could not be obtained due to the respondents' obstructionist tactics and the trial court's refusal to compel the respondents to provide discovery. Hence, there was no possibility of obtaining direct evidence of a conspiratorial agreement. Dr. Williams nonetheless provided sufficient evidence as to whether such an agreement existed; an issue which should not have been taken from the jury. A jury could reasonably infer from the circumstances that the alleged conspirators had a meeting of the minds and had an understanding to achieve the conspiracy's objectives. See, Adickes v. Kress & Company, 398 U.S. 144, 158-59 (1970).

Even where all the evidence does not point in one direction, if different inferences might reasonably be drawn from it, judicial intrusion is not permitted upon the jury's role of determining whether a civil conspiracy existed. Continental Ore Company v.

Union Carbide and Carbon Corp., 370 U.S. 690, 700-01 (1962); see also, Adickes, supra, 398 U.S. at 176 (Black, J., concurring) (when a plaintiff alleges a conspiracy to violate civil rights, "the existence or non-existence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide."

Albert v. Carovano also supports Dr. Williams' private conspiracy claim. In accordance with the understanding of the drafters of §1981, race for the purposes of the statute comprehends ethnicity. Id. 851 F.2d at 571, citing, St. Francis College v. Al-Kazraji, 481 U.S. 604 (1987). Dr. Williams submitted proof of a pattern of discrimination against African Americans (Drs. Williams, Gayles and Dillon) and Asian Americans (*i.e.*, Drs. Jin, Fazili and Kamisetti), and retaliation against Dr. Williams and others who supported such physicians, which should been considered by the lower courts, but was brushed aside based no an unduly restrictive reading of plaintiff's claims. In contrast to the sparse allegation in Albert v. Carovano of selective enforcement of college rules against the plaintiffs because they were black or Latino, Dr. Williams identified that he and other minority physicians were subjected to discipline beyond the rules established by Sheehan, because they were black, Asian American, or supported the rights of blacks or Asian Americans, thus sufficiently supporting his claim under §§1981, 1982 and 1985 (R 149, 191-192, 216, 875-879, 889-893). See, Albert v. Carovano, 851 F.2d at 572.

Dr. Williams specified how he was singled out for unlawful oppression, in contrast to others similarly situated white physicians. The Appellate Division affirmed the trial court's unduly narrow view of what "similarly situated" means despite the Second Circuit Court of Appeals' holding in Albert v. Caravano that the "similarly situated" requirement of a claim for purposeful and systematic discrimination in violation of the Fifth and Fourteenth Amendment right to equal protection under the law, embodied in §§1981 and 1982, does "not mean that exactly, rather than reasonably, comparable cases must be alleged." 851 F.2d at 572. Dr. Williams provided evidence to show that white physicians, defendants Pietrak and Mitchell, were not subject to any discipline, let alone discipline outside the boundaries of the peer review bylaws of Sheehan, even though they performed an allegedly contra-indicated procedure on a patient, while Dr. Williams was subjected to extraordinary discipline, even though Dr. Williams never treated the patient (R 657-661, 665). Dr. Williams also proffered evidence of similar treatment, going beyond Sheehan's bylaws, by respondent Blackwell in connection with Dr. Jin's case and Dr. Gayles' case; retaliatory action against Asian American physicians for supporting Dr. Jin and Dr. Gayles; and retaliation against Williams for supporting Drs. Jin and Gayles (R 667, 671, 673). Under Albert v. Carovano, and the cases cited thereunder, Dr. Williams stated a claim under §§1981, 1982 and 1985 sufficiently supported by facts, which should not have been summarily dismissed.

II. Civil Rights Plaintiffs Are Entitled to Discovery to Prove Racial Motivation and State Action.

Dr. Williams sought discovery to adduce additional facts to support his allegations that Dr. Blackwell, M.D., frustrated by Dr. Williams' and other minority physicians' exoneration as a result of internal peer review procedures at Sheehan, directed or reported such minority physicians to the State Department of Health and/or the Attorney General (R 664, 665, 682-683).

Plaintiff targeted his discovery to obtain additional facts to support the state action element of his §1983 claim. In deposition notices and a notice to produce documents, plaintiff made specific documentary requests to obtain evidence from the respondents relevant to that aspect of his claim (see, e.g. R 254, 275-277). Respondents refused to respond to those requests. It was unfair to dismiss Dr. Williams' case without giving him an opportunity to discover additional facts in support of his conspiracy claim, particularly after the defendants were allowed to complete their discovery. Failure to allow one party discovery is tantamount to tying a prizefighter's gloves behind his back while allowing his adversary to pummel away, without any fear of being struck back.

Federal courts in New York have rejected the notion that inferences from circumstances to show racial motivation cannot be considered on a motion for summary judgment. Allegations of racial animus involving a defendant's state of mind are difficult to

prove, particularly at the pleading stage. See, e.g., White v. Frank, 680 F.Supp. 629 (S.D.N.Y.), appeal dismissed, 855 F.2d 956 (2d Cir. 1988) (denial of motion to dismiss §1985 claim because allegations of racial animus involved defendant's state of mind are difficult to prove); Williams v. Greendolf, Inc., 835 F.Supp. 137, 137 (S.D.N.Y. 1990) (it is difficult to imagine how plaintiff could have alleged with particularity the state of mind of the defendants, the "real question is whether the complaint alleges facts sufficient to raise an inference of racial motivation"). Violation of Dr. Williams' due process and equal protection rights (established in the Article 78 judgment in Dr. Williams' favor) was established based on factual allegations of overt acts which give rise to a reasonable inference of conspiracy. See, Long Island Lighting Company v. Cuomo, 666 F.Supp. 370, 425-426 (N.D.N.Y. 1987), vacated in part on other grounds, 888 F.2d 230 (2d Cir. 1989) ("conspiracies are seldom proven with direct evidence, and. . . factual allegations of overt acts which give rise to a reasonable inference of the formation and furtherance of a conspiracy will suffice").

Facts surrounding a conspiracy claim are usually not available to the plaintiff, thus requiring discovery and denial of motions for summary judgment in civil rights cases when the record is not sufficiently developed. See, e.g., Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 725 F.Supp. 669 (N.D.N.Y. 1989) (implicit in the text of Rule 56 of the Federal Rules of Civil Procedure is a requirement of sufficient time for discovery).

Dr. Williams noticed depositions of all respondents, with detailed requests for relevant documents (R 251-274), and when respondents refused to submit to depositions, he served a Notice to Produce Documents, which respondents ignored. Counsel for respondents then obstructed plaintiff's efforts to depose material non-party witnesses (R 279-325). In a cross-motion to compel discovery, Dr. Williams outlined the refusal to respond to discovery requests targeted to specific elements of his claims. The inability to obtain evidence from key non-party witnesses Nancy Lampkin, R.N. and Dr. Eddie Hoover was caused by counsel for respondents Maddi, Blackwell and Sheehan, due to shifting claims of representing or not representing Sheehan's former employees and Committee members (R 246-249, 311, 314, 317-318, 324). Although respondents submitted Nurse Lampkin's contradictory Article 78 affidavits (R 627-633, 640-642) and a February 7, 2000 letter from Dr. Hoover (R 143), Dr. Williams was denied discovery to examine Nurse Lampkin's statement concerning the need to contact OPMC, contrary to Sheehan's board minutes, and Dr. Hoover's statements to Dr. Williams that respondent Blackwell instigated Dr. Hoover's February 7, 2000 and the June 8, 2000 Hassenfratz letters and was out to get Dr. Williams, and that (R 666-668, 671, 673). The Hoover and Lampkin depositions were necessary (along with depositions of the respondents and responses to plaintiff's document demands) to develop proof that respondent Blackwell was behind both acts.

By denying Dr. Williams discovery concerning respondents' motives and explanations for depriving Dr. Williams' due process rights under Sheehan's bylaws, in essence, the courts below further violated Dr. Williams' civil rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Buffalo, New York
January 26, 2004

Respectfully submitted,

Gerald T. Walsh
Counsel of Record
Zdarsky, Sawicki & Agostinelli
Attorneys for Petitioner
Aston B. Williams, M.D.
404 Cathedral Place
298 Main Street
Buffalo, New York 14202
(716) 855-3200

APPENDIX A
Order of the New York Court of Appeals, Filed October 28, 2003.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-eighth day of October, 2003.

PRESENT, Hon. Judith S. Kaye, Chief Judge, presiding

4-10 Mo. No. 822

Aston B. Williams, M.D.
Appellant,

v.

Joseph Maddi, et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

S/Stuart M. Cohen
Clerk of the Court

DECISION October 28, 2003

4-10 Mo. No. 822

Aston B. Williams, M.D.
Appellant,

v.

Joseph Maddi, et al.,
Respondents.

Motion for leave to appeal denied without costs.

APPENDIX B

Order of the New York Supreme Court, Appellate Division, Fourth Department, Filed June 13, 2003.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

664 CA 03-00190

PRESENT : GREEN, J.P., WISNER, SCUDDER, KEHOE, AND BURNS, JJ.

ASTON B. WILLIAMS, M.D., PLAINTIFF-APPELLANT,

V. Memorandum and Order

JOSEPH MADDI, OLIVIA BLACKWELL, THOMAS A. HASSENFRATZ, JOSEPH SERGHANY, SHEEHAN MEMORIAL HOSPITAL, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

ZDARSKY, SAWICKI & AGOSTINELLI, BUFFALO (GERALD T. WALSH OF COUNSEL) FOR PLAINTIFF-APPELLANT.

DAMON & MOREY LLP, BUFFALO (JUDY S. HERNANDEZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JOSEPH MADDI, OLIVIA BLACKWELL, AND SHEEHAN MEMORIAL HOSPITAL.

FELDMAN, KIEFFER & HERMAN, LLP, BUFFALO (MICHELE K. SNYDER OF COUNSEL), FOR DEFENDANT-RESPONDENT THOMAS A. HASSENFRATZ.

WEBSTER SZANYI LLP, BUFFALO (DAVID P. MARCUS OF COUNSEL), FOR DEFENDANT-RESPONDENT JOSEPH SERGHANY.

Appeal from an order of Supreme Court, Erie County (NeMoyer, J.), entered October 16, 2002, which, inter alia, granted the motions of defendants Joseph Maddi, Olivia Blackwell, Thomas A. Hassenfratz, Joseph Serghany, and Sheehan Memorial Hospital and dismissed the complaint against them.

It is hereby ORDERED that the order so appealed from be and the same hereby is unanimously affirmed without costs.

Memorandum: Supreme Court properly granted the motions of defendants Thomas A. Hassenfratz and Joseph Serghany for summary judgement dismissing the complaint against them, and the motion of defendants Joseph Maddi, Olivia Blackwell and Sheehan Memorial Hospital (Sheehan) to dismiss the complaint pursuant to CPLR 3211 (a) (7) or, alternatively, for summary judgement dismissing the complaint against them. The individual defendants, physicians employed by Sheehan, established that their conduct is not "fairly attributable" to the state (*American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 US 40, 50), and "the fact that [Sheehan] [is] regulated by the state and receive[s] substantial public funding is, without more, woefully insufficient to impute state action to the conduct of the [moving] defendants" (*Alcena v Raine*, 692 F Supp 261, 266). Thus, the moving defendants established that they were not acting under color of state law for purposes of the cause of action alleging a violation of plaintiff's civil rights under 42 USC § 1983, and plaintiff failed to raise a triable issue of fact. Further, the "conclusory, vague and general allegations of a conspiracy to deprive [plaintiff] of

constitutional rights" are insufficient to support plaintiff's claim under 42 USC § 1985 (3) (*Kubik v. New York State Dept. of Social Servs.*, 244 AD2d 606, 610). With respect to the third cause of action, alleging defamation against Maddi, we conclude that Maddi, Blackwell and Sheehan submitted proof establishing that the allegedly defamatory statement was not made, and plaintiff failed to raise a triable issue of fact (see *Schwartz v Society of N.Y. Hosp.*, 232 AD2d 212, 213). We have considered plaintiff's remaining contentions and conclude that they are lacking in merit.

Entered: June 13, 2003

JoAnn M. Wahl
Clerk of the Court

Supreme Court)
Appellate Division,)
Fourth Judicial Department,)
Clerk's Office, Rochester, N.Y.)

I, JOANN M. WAHL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in the City of Rochester, New York, this 13th day of June, 2003.

_____

Clerk.

APPENDIX C

Order of the New York Supreme Court (Erie County, Nemoyer, J.), Granted October 9, 2002 and Entered October 15, 2002.

At a Special Term of the Supreme Court held in and for the County of Erie, at the Courthouse thereof, in Buffalo, New York, on the 6 th day of September, 2002.

HON. PATRICK H. NeMOYER, J.S.C.
Justice Presiding
STATE OF NEW YORK
SUPREME COURT :: COUNTY OF ERIE

ASTON B. WILLIAMS, M.D.,
Plaintiff, ORDER

vs.

JOSEPH MADDI, Index No.: 2001-5692
OLIVIA BLACKWELL,
THOMAS A. HASSENFRATZ, JOSEPH SERGHANY, Individually and in their capacities as Employees, Agents and/or Officers of SHEEHAN MEMORIAL HOSPITAL, MICHAEL J. MITCHELL and STANLEY PIETRAK

Defendants.

The Defendants, Joseph Serghany having moved this Court for an order granting summary judgment pursuant to CPLR 3212; Thomas A. Hassenfratz having moved this Court for an order granting summary judgement pursuant to CPLR 3212; and Sheehan Memorial Hospital, Joseph Maddi and Olivia Blackwell having moved this Court for an order dismissing the Complaint pursuant to CPLR 3211, or in the alternative, granting summary judgement pursuant to CPLR 3212; and the Plaintiff Aston B. Williams, M.D.

having moved for a continuance pursuant to CPLR 3212 (f), to extend the discovery deadline, to compel discovery pursuant to CPLR 3124 and for an order lifting the stay imposed by CPLR 3214 (b), and said motions having come on regularly to be heard;

NOW upon reading and filing:

Defendant Joseph Serghany's Notice of Motion for summary judgement dated July 23, 2002, together with the affidavit of Joseph Serghany, sworn to July 20, 2002, and affidavit of David P. Marcus, Esq., sworn to July 22, 2002, with exhibits A through M, all in support of Defendant Joseph Serghany's motion; and the Affidavit of David P. Marcus, Esq., sworn to August 16, 2002, in opposition to Plaintiff's motion for a continuance;

Defendant Thomas A. Hassenfratz's Notice of Motion for summary judgment dated August 13, 2002, together with the Affidavit of Thomas A. Hassenfratz, sworn to August 14, 2002, the Affidavit of Michele K. Snyder, Esq., sworn to August 14, 2002, with exhibits A through B, and the reply Affidavit of Michele K. Snyder, Esq., sworn to September 4, 2002, all in support of Defendant Thomas A. Hassenfratz's motion;

Defendants Sheehan Memorial Hospital's, Joseph Maddi's and Olivia Blackwell's Notice of Motion to dismiss or for summary judgement dated August 23, 2002, together with the Affidavit of Joseph A. Peeler, sworn to August 20, 2002, with exhibits A through G, the Affidavit of Olivia Smith-Blackwell, sworn to August 22, 2002, the Affidavit of Joseph Maddi, sworn to August 23, 2002, and the Affidavit of Judy S. Hernandez, Esq., sworn to August 22, 2002, with exhibits A through G, all in support of Defendants Sheehan Memorial Hospital's, Joseph Maddi's and Olivia Blackwell's motion; and the Affidavit of Judy S. Hernandez, Esq., sworn to August 30, 2002, in opposition to Plaintiff's motion for a continuance;

Plaintiff Aston B. Williams' Complaint; Notice of Motion for a continuance, to extend discovery, to compel discovery

and to lift the stay on discovery dated August 2, 2002, together with the Affidavit of Gerald T. Walsh, Esq., sworn to August 2, 2002, with exhibits 1 through 7, in support of Plaintiff's motion; and the Affidavit of Aston B. Williams, sworn to August 27, 2002, with exhibits 1 through 14, and the Affidavit of Gerald T. Walsh, Esq., sworn to August 30, 2002, with exhibits 1 through 2, both in opposition to the motions of Defendants Joseph Serghany, Thomas A. Hassenfratz and Sheehan Memorial Hospital, Joseph Maddi and Olivia Blackwell;

NOW upon hearing Webster Szanyi LLP (David P. Marcus, Esq.) on behalf of Joseph Serghany in support of his motion for summary judgement and in opposition to Plaintiff's motion for a continuance; Feldman, Kieffer & Herman, LLP (Michele K. Snyder, Esq.) on behalf of Thomas A. Hassenfratz in support of his motion for summary judgement; Damon & Morey LLP (Judy S. Hernandez, Esq.) on behalf of Sheehan Memorial Hospital, Joseph Maddi and Olivia Blackwell in support of their motion to dismiss or, alternatively, for summary judgement and in opposition to Plaintiff's motion for a continuance; and Zdarsky, Sawicki & Agostinelli (Gerald T. Walsh, Esq.) on behalf of Plaintiff Aston B. Williams in support of his motion for continuance and in opposition to the motions of Defendants Joseph Serghany, Thomas A. Hassenfratz, and Sheehan Memorial Hospital, Joseph Maddi and Olivia Blackwell, and due deliberation having been had thereon and pursuant to this court's Bench Decision of September 6, 2002, the transcript of which is annexed hereto and made part hereof:

NOW, THEREOF, IT IS

ORDERED that Defendant Joseph Serghany's motion for summary judgement is GRANTED and Plaintiff's Complaint is DISMISSED in its entirety as to Joseph Serghany, and it is further

ORDERED that Defendant Thomas A. Hassenfratz's motion for summary judgement is GRANTED and

Plaintiff's Complaint is DISMISSED in its entirety as to Thomas A. Hassenfratz, and it is further

ORDERED that Defendants Sheehan Memorial Hospital's, Joseph Maddi's and Olivia Blackwell's motion to dismiss or, alternatively, for summary judgement is GRANTED and Plaintiff's Complaint is DISMISSED in its entirety, pursuant to CPLR 3211 and 3212, as to Sheehan Memorial Hospital, Joseph Maddi and Olivia Blackwell and it is further

ORDERED that Plaintiff Aston B. Williams' motion for a continuance, to extend discovery, to compel discovery and to lift the stay on discovery is DENIED.

DATED:

_____

Hon. Patrick H. NeMoyer, J.S.C.

APPENDIX D
Transcript of Bench Decision of the New York Supreme Court (Erie County, NeMoyer, J.), Dated September 6, 2002.

Ms. Hernandez

really an attempt to somehow keep these folks from him or really be obstructionist in this regard, and that simply is not the case.

THE COURT: His allegation is you're attempting to get summary judgement without giving him an opportunity to prove his case.

MS. HERNANDEZ: That is absolutely not the case, your Honor.

THE COURT: I'm going to deny your motion, Mr. Walsh. I don't believe that you've satisfied the Court that there's any additional information that's necessary and required before the Court will rule on the summary judgement motion and that further delay would only serve to add additional cost to the parties who might well be entitled to summary judgement at this point in time. Okay. Next issue would be the motion for summary judgement by Dr. Serghany? And that's just because it's the order I read them in. If there's a different order that you wish to address it in?

MR. MARCUS: This is fine, your Honor, I believe. I'm happy to go first.

THE COURT: And again, I've read your papers. I understand your position. You believe that, what - -

* * * * *

MR. WALSH: By Dr. Mitchell, apparently.

THE COURT: But what your contention is, as I understand it, is your client was contacted by Dr. Mitchell and was asked to come down and either view this client or

perform a procedure and your client declined. Certainly, there's no one else with that factual situation presented here who was treated in a different fashion. Dr. Pietrak was there and in fact performed the procedure that Dr. Mitchell apparently thought was required or was necessary. Now, whether their judgement was wrong, they certainly were there and performed it. Now, your client wasn't there. Now, apparently, his position was found not to be in violation, but certainly he was not in the same position in this identical factual situation as Dr. Pietrak. I don't consider that the same situation.

What I find - - and I'm prepared to make my rulings now - - is I don't believe allegations of differential treatment between white and black doctors in general have been proven. You haven't shown that there's a racial discriminatory animus here. You haven't shown that, given the same factual situation, that Dr. A, who did this, was suspended because he was black, and Dr. B, who did this, who was white, was not suspended under the same factual situation. You make a averments of that, you make suggestions of it, you make inferences of it, but the Court hasn't found that there's been established any factual proof, and claims, any facts that the parties could point to showing there was a discriminatory animus or that there was in fact differential treatment based on similar facts and situations.

The Court also finds that the complaint has failed to present any evidence of intentional wrongful action taken against your client by any of the named defendants, and therefore - - although certainly on the motion only those defendants who have made the motion. So, apparently, Defendants Mitchell and Pietrak will remain in the action. The Court does not find that the factual statements were sufficient. The complaint must set forth facts. I find that there are no facts set forth here sufficient for the Court to rule. There must be more than mere speculation. The Court does not believe there is. There is only speculation

that there is differential treatment, no proof to the Court's satisfaction. No facts.

As to the 1983 action, the Court does not find that there is any evidence that the parties have acted under State law. Your position in your brief, in your response, was that the action may be fairly attributable to the State, that the coercive power was exercised by the State, that the State was a joint participant. The Court does not find that there is any evidence, any suggestion that there is any proof or allegations in the complaint where State action can be properly inferred by the Court and therefore dismisses the 1983 action.

The Court also finds that the action of the medical executive committee is protected under New York State Education Law and that you have failed to show malice on the part of Dr. Serghany or Dr. Hassenfratz. The Court does not believe that any of the requested documents regarding the funding, the HUD mortgage, or any allegations of public officials on the board are sufficient or could be sufficient to sustain a 1983 action. The Court also finds that the parties were entitled to qualified immunity based upon the action of the medical executive committee, that there has been no proof offered that the committee operated in a discriminatory - - racially discriminatory animus, and the Court does believe at least for this point that it has been established that they were one employer, one action, one conspirator, and the Court does not find that the intra conspiracy doctrine is not applicable, as you state, because the Court does not find that any of the parties had a personal stake exception that you refer to as Girard. I don't see it, I don't find it, I don't believe that that would apply.

As to the issue about - - let's see - - point two on the brief of Sheehan. Again, that's the same thing, that there is a - - a vague and general. I agree with you that the Federal immunity issue is not applicable in this case because of the specific language of the statute and I don't

dismiss on that basis. I find on the - that you have failed to state a claim for defamation for various reasons. First, I don't find "We don't want him down here anymore" actionable in and of itself. I don't believe that those statements complained of construe an actionable opinion. I find that the statements were indefinite, ambiguous, and incapable of being objectively characterized as true or false and therefore I find that they were subject to the qualified privilege. Also, I find that there - you cannot establish that they were made or published in the light of the fact that Dr. Maddi and Dr. Mahl, who your client made the statement to him, deny it. Therefore, I find that even if they were, I don't believe they can - - they are actionable. Even if they were actionable, there was no proof that they were made and that you cannot rely solely on hearsay allegations.

As to your statement that New York law doesn't provide immunity, one of your positions is that it doesn't provide immunity for information which is untrue and communicated with malicious intent. The Court does not find that there has been sufficient proof or claim of that and therefore that immunity is applicable. Under your position that the private conspiracy claims under 1981, 82 and 85 cannot be dismissed, I find that the criteria under Griffin have not been sufficiently - - sufficiently or adequately pled and therefore I do dismiss. Although you must establish a prima facie case based upon the allegations, I don't believe you have. Even if you had, the burden had shifted to you because of the affidavits submitted by the defendants and that you have failed to respond and show that the reasons were protectural. Again, on the intra conspiracy doctrine, I don't believe that you have shown the exceptions that are applicable in this case or that you claim apply due - - given the facts and I do not believe there is material issue of fact on the defamation claim.

And that's the Court's finding. So ordered.

MR. WALSH: Your Honor, may I ask two questions?

THE COURT: Yes.

MR. WALSH: Just for clarification, because I'm going to make sure when the Court says dismissed, is that under 3211 or 3212?

THE COURT: 3211. And if - - I'm converting parts of it to 3212. Certainly, you're going to be defending it on appeal. What do you believe is that applicable section? I'm dismissing it because I don't believe the factual complaints in the - - the factual allegations in the complaint were sufficient and therefore I'm dismissing it under 3211 as far as the Court is concerned. Do you believe I'm wrong on that?

MR. MARCUS: Your Honor, I think you're correct to dismiss it under 3211. I also believe that, based on the fact that you appear to be reviewing the - - the entire record in this case, I believe it's also properly dismissible under 3212, which is the basis upon which we made our motion.

THE COURT: The Court did review the materials submitted, including the deposition testimony, which was appended in large part, and the Court - - just so it's clear up on appeal, I wouldn't want them sending it back to me if I didn't do it at 3212. The Court will add that I do it based upon review of the record. I believe that I'm doing it under 3211 and 3212. If the Appellate Division believes I'm wrong, I certainly wouldn't want it to come back for that reason.

MR. WALSH: No. I appreciate that, your Honor.

THE COURT: Okay.

MR. WALSH: The other issue, I just want to make it clear, the first part of your order, with respect to the differential treatment, I think the Court said it was my burden to show that there was another doctor who was on call and didn't respond. I had to prove something that specific in order to show differential treatment.

THE COURT: What I was saying, there had to be - - as far as the Court was concerned, there had to be some factual averment in the complaint showing that there were similarly situated physicians who were treated differently because of their color. I found no indication of that or no factual proof of that in the complaint, no factual allegation of that in the complaint sufficient - - with sufficient particularity for the Court to rule on.

The Court will rule on the fact of any application of attorney's fees. Up to this point, I do not believe the action has been brought in bad faith and the Court would not sustain if there was a request for attorney's fees. Since it is discretionary with the Court, I would not find that it is that way. However, you know, as we go forward, that can change.

MR. WALSH: Thank you, your Honor.

THE COURT: Thank you.

MR. MARCUS: Thank you, your Honor.

THE COURT: And you can appeal that part of the issue if you wish. Thank you.

MS. HERNANDEZ: Thank you, your Honor.

(Court adjourned at 4:39 p.m.)

* * * * *

CERTIFICATION

I certify that the foregoing transcript constitutes a complete and accurate record of the proceedings upon the case of Williams v. Maddi et al heard on September 6, 2002.

_____

Valerie Antos, C.S.R.
Official Court Reporter